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80-5520

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

ROBERT LEE MASSIE,

PETITIONER,

vs.

GEORGE SUMNER, Warden,

San Quentin State Prison,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDALL C. BRUMMITT
COUNSEL OF RECORD
1330 Broadway, Suite 1650
Oakland, California 94612
Telephone: (415) 452-3400

Attorney for Petitioner

QUESTIONS PRESENTED

1. Does a mentally competent criminal defendant, duly convicted and sentenced to death in a state trial court, have a constitutional right to (a) reject counsel appointed by the state to maintain a statutorily mandated appeal of the conviction and death sentence and (b) dismiss the automatic appeal?

2. When a mentally competent defendant who is duly convicted and sentenced to death desires and attempts to waive a statutorily mandated appeal of his conviction, does the failure to immediately carry out the death sentence and the resulting incarceration of the defendant pending resolution of the appeal constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

3. Does requiring a duly convicted and sentenced defendant to take an unwanted appeal place the defendant in danger of being twice placed in jeopardy, in violation of the Fifth and Fourteenth Amendments?

4. When a criminal defendant, duly convicted and sentenced to death, desires and attempts to waive his right to a statutorily mandated appeal of his conviction and sentence, does the failure to carry out the death sentence and the resulting incarceration of the defendant pending resolution of the appeal constitute involuntary servitude in violation of the Thirteenth Amendment?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Robert Lee Massie respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 30, 1980.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, infra) is reported at 624 F.2d 72. That court's order denying petitioner's Petition for Rehearing En Banc (Appendix B, infra) was filed on August 15, 1980, and is not reported. The district court's Order of Dismissal was filed on October 3, 1979 (Appendix C, infra), and is not reported. The district court's order denying petitioner's Petition for Reconsideration was filed on November 1, 1979 (Appendix D, infra), and is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed June 30, 1980. A timely Petition for Rehearing En Banc was denied on August 15, 1980. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions and statutes are: United States Const. Amends. V, VI, VIII, IX, XIII and XIV; California Penal Code §§1239(b) and 190.6, all of which are set forth in Appendix F.

STATEMENT OF THE CASE

This case involves the legality of California Penal Code §1239(b), which compels a defendant sentenced to death to take an automatic appeal to the California Supreme Court.

On February 20. 1979, the petitioner in this action was charged in California Superior Court with nine counts, including

first degree murder committed under special circumstances which could subject the petitioner to imposition of the death penalty. On May 8, 1979, petitioner pleaded guilty to all nine counts and admitted the allegations of "special circumstances". On May 25, 1979, petitioner was sentenced to death.

Without petitioner's consent, an appeal of his conviction and death sentence was automatically filed with the California Supreme Court pursuant to §1239(b). In response to that court's appointment of counsel to represent petitioner on appeal, petitioner moved the court to dismiss the appeal and petitioned for a writ of mandamus or alternative writ to inforce the sentence of the trial court. On June 27, 1979, the California Supreme Court denied both the motion to dismiss the appeal and the Petition for a Writ of Mandamus or Alternative Writ.

On July 9, 1979, petitioner, appearing in propria persona, petitioned the United States District Court for the Northern District of California for a writ of habeas corpus, naming as respondent the warden at San Quentin Prison where petitioner has been incarcerated since the death sentence was imposed. Petitioner stated the following grounds, inter alia, for the issuance of the writ;

(a) The automatic appeal provisions of §1239(b) violate petitioner's right of self-representation, including the right to dismiss his appeal, in violation of the Sixth, Ninth and Fourteenth Amendments; (2) Section 1239(b) forces petitioner to endure cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, because he is subject to unnecessary psychological torment due to the delay and uncertainty surrounding the carrying out of his death sentence; (3) Section 1239(b) forces petitioner to take an unwanted appeal and thereby places petitioner in danger of being twice in jeopardy for the same offense, in violation of the Fifth and Fourteenth Amendments; (4) The refusal

by the State to dismiss the unwanted appeal and carry out petitioner's lawful death sentence forces petitioner to be subjected to incarceration and punishment in excess of his lawful sentence, thereby constituting involuntary servitude in violation of the Thirteenth Amendment.

On October 3, 1979, the district court dismissed the habeas corpus petition, stating that petitioner had failed to establish a violation of his constitutional rights.[1] In its Order of Dismissal, however, the court apparently addressed itself only to the issue of cruel and unusual punishment. Noting that petitioner had been sentenced in May of 1979, and that pursuant to California Penal Code §190.6[2], petitioner's automatic appeal should be decided by December 28, 1979, the court held that a seven month wait for execution would not be cruel and unusual punishment. The Court further noted, however, that petitioner's incarceration might become cruel and unusual if §190.6 was not enforced and petitioner was forced to suffer a prolonged appeal. Additionally, the court held that petitioner's right to waive his appeal was outweighed by the State's interest in insuring accuracy in its death penalty determinations.

On June 30, 1980, the Ninth Circuit affirmed the decision of the district court. In discussing the issue of petitioner's right to represent himself and dismiss his own appeal, the court characterized the assertion of this constitutional right by

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1/ At the district court hearing on the habeas corpus petition, petitioner was not allowed to attend or make oral argument, although he moved the district court to allow him to do so and although respondent's counsel was allowed to make oral argument.

2/ California Penal Code §190.6 provides that an automatic appeal of a conviction resulting in a death sentence must be heard by the California Supreme Court within 150 days of filing the appeal.

petitioner as a waiver of a right to an appeal. From that premise, and from the premise asserted by respondent that a litigant may not waive a law established for the benefit of the public, the court proceeded to hold that petitioner's attempted waiver of his appeal was subservient to the state court's duty to conduct a review of petitioner's death sentence.

The circuit court also stated that petitioner's right of self-representation was limited, and that counsel could be appointed over a defendant's objections in order to protect the public interest in the fairness and integrity of the proceedings. While the court recognized that a criminal defendant has a right to refuse appeals in certain situations, it held that this right was also limited and that a state could require reasonable proceedings in order to protect its own interest in the fairness of its own determinations.

Except as implied in the court's discussion of petitioner's right of self-representation, the circuit court apparently did not address the issue of cruel and unusual punishment or any of the other issues raised by petitioner.

REASONS FOR GRANTING THE WRIT

Petitioner submits that this case involves issues raised but not resolved by several recent decisions regarding a criminal defendant's right of self-representation. Petitioner further submits that this case involves the issue of cruel and unusual punishment with regard to prisoners sentenced to death and incarcerated on "death rows" pending unwanted appeals of their death sentences, and that this Court has not, nor has the Circuit Court below in this case, squarely addressed and decided this issue. Petitioner submits that the resolution of these and the other issues presented here would be an appropriate exercise of this Court's jurisdiction. In particular this petition should be granted for the following reasons:

1. This Court held in Faretta v. California, 422 U.S. 806(1975), that a criminal defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that when confronted with such a voluntary and intelligent waiver, the state may not force unwanted counsel on the defendant. In Faretta, this Court cited a wealth of authority for the proposition that the right of self-representation is necessarily implied by the structure and history of the Sixth Amendment, and is embodied in the "universal conviction" that forcing an unwanted lawyer upon an unwilling defendant is contrary to his basic right to present his own defense. In light of this Court's reasoning in Faretta and the recent per curiam opinion in Hammett v. Texas, 100 S.Ct 2905(1980) (a defendant sentenced to death was allowed to withdraw a petition for certiorari to review his conviction which was filed by the defendant's counsel without the defendant's consent and against his wishes), petitioner submits that the Sixth Amendment right of self-representation guarantees the right to represent oneself on appeal and thereby dismiss such an appeal. Petitioner further submits that the State's refusal to comply with petitioner's request to dismiss the unwanted appeal violates his right to control his own defense and decide whether to present any defense, a right that is retained by virtue of the Ninth Amendment.

2. This Court is aware of the large number of persons incarcerated on death rows and awaiting executions in prisons throughout the country. This Court is also aware of attempts by various persons on death row to forego appeals and have their death sentences swiftly carried out. See Gilmore v. Utah 429 U.S.(1976); Evans v. Bennett, 99 S.Ct. 1481(1979). Petitioner can find no recent instance where this Court has addressed the issue or cruel and unusual punishment in the context of mental suffering of prisoners on death row awaiting execution and the

Ninth Circuit below apparently chose not to address this issue. In view of this, and in light of the district court's statement in October of 1979 that petitioner's confinement on death row might become cruel and unusual punishment if he was forced to suffer a prolonged appeal, and in light of the fact that petitioner has already spent 15 months on death row pending the resolution of his unwanted appeal, the Ninth Circuit's decision below is appropriate for review in order to decide this unsettled constitutional issue and determine the rights of the many persons incarcerated on death rows.

3. Petitioner submits that, in conjunction with his right of self-representation, the State's forcing of an unwanted appeal upon him places him in danger of being twice placed in jeopardy in the form of an unwanted retrial, and that the unwanted appeal itself is in the nature of being placed in jeopardy for a second time in violation of the Fifth and Fourteenth Amendments. This as yet undecided issue was not addressed by the Ninth Circuit below, and is therefore an appropriate question for review by this Court.

4. The refusal of the State to abide by petitioner's wish to forego the unwanted appeal subjects petitioner to lengthy and undue incarceration in excess of the death sentence punishment pronounced by the state trial court. Petitioner submits that this action by the state violates the Thirteenth Amendment prohibition against involuntary servitude. Once again, the Ninth Circuit below apparently overlooked this issue, and for this reason and the reasons stated above regarding incarceration of persons awating execution, this question is appropriate for review by this Court.

I

The Petition Should Be Granted To Consider Whether A Criminal Defendant's Right Of Self-Representation Extends To Criminal Appeals And The Right To Dismiss An Appeal

Under the circuit court's decision below, California's automatic appeal statute regarding death sentences (Penal Code §1239(b)) is allowed to prohibit a convicted defendant who wishes to forego an appeal from effectively representing himself and refusing or dismissing the unwanted appeal. While §1239(b) may embody a legitimate state interest of reviewing death sentences, it is clear that such an interest must give way to the exercise of the constitutionally guaranteed right of self-representation. By holding that petitioner's right of self-representation did not apply to his criminal appeal, the Ninth Circuit acted contrary to decisions of this Court establishing the right of self-representation and allowing a criminal defendant to dismiss an unwanted appeal.

In Faretta v. California, 422 U.S. 806(1975), this Court held that a criminal defendant has a constitutional right to proceed without counsel when he voluntarily chooses to do so, and that when confronted with such a voluntary and intelligent waiver, the State may not force unwanted counsel on defendant.[3] This Court began its discussion in Farretta by noting that the right of self-representation in criminal cases is afforded by statute in the federal courts and by the great majority of the States, and further noted that many state courts and United States Courts of Appeals had held that the right is supported by the Bill of Rights, and in particular, the Sixth Amendment. The Court then stated:

> We confront here a nearly universal conviction on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself

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3/ The Second Circuit has held that the right of self-representation guaranteed by the Sixth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. Phillips v. Tobin, 548 F.2d 408(2d.Cir. 1976).

if he truly wants to do so. Id., at 817 (emphasis added).

The Court proceeded to find support for the right of self-representation in the structure of the Sixth Amendment;

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.... An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense. Id., at 820, 821(emphasis added).

This reading of the Sixth Amendment, said the Court, is reinforced by the Amendment's roots in English and American legal history. After discussing a wealth of history supporting this reading, the Court concluded:

> In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation.... The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.
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> ....
>
> ... The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice. Id., at 932, 833(footnotes omitted).

It is obvious that "thrusting unwanted counsel" upon petitioner and forcing him to take an unwanted appeal likewise "violates the logic of the Amendment". The counsel appointed by the State in petitioner's unwanted appeal are not presenting petitioner's defense, and therefore are not presently the "defense guaranteed him by the Constitution".

Petitioner merely wishes to present his own "defense",

which in his case happens to be a refusal to present a defense on appeal. To allow the State to appoint unwanted counsel for petitioner and force him to take an unwanted appeal, is to strip petitioner of the last vestiges of personal dignity inherent in choosing whether or not to present a defense and thereby control his own destiny. Thus, the Court in Faretta quoted with approval the following from Adams v. United States ex rel. McCann, 317 U.S. 269(1942):

> ... When the administration of the criminal law ... is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards ... is to imprison a man in his privileges and call it the Constitution. Id., at 279-280....

Respondent has not alleged herein that petitioner has not voluntarily waived counsel or that he is not competent to do so. On the contrary, the trial judge questioned the petitioner at length regarding his election to represent himself at trial. After fully informing petitioner of the problems and possible disadvantages in representing himself, the trial court found that petitioner had voluntarily and intelligently waived his right to counsel and was competent to represent himself.[4] In addition, petitioner previously represented himself in a §1239(b) appeal without assistance of counsel. See People v. Massie, 66 Cal.2d 899, 429 P.2d 869(1967). To the extent that the circuit court's decision below questions petitioner's competency to represent himself, the decision is clearly not based on the facts of this case.

It cannot be maintained that because petitioner has no contitutional right to appeal, he therefore has no constitutional

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4/ See the Reporter's Transcript of petitioner's state trial, at 142 - 181, attached hereto as Appendix G.

right of self-representation on appeal. Although it is true that there is no constitutional right of appeal in state courts, McKane v. Durston, 153 U.S. 684(1894), this Court and other federal courts have held that where appellate review is provided by a state, such review must satisfy the Fourteenth Amendment's basic standards of due process and fairness. Griffin v. Illionis, 351 U.S. 12(1955); Nelson v. Collins, 455 F.Supp. 727(D.C.Md.1978), aff'd in part and remanded, Johnson v. Levine, 588 F.2d 1378; Macon v. Lash, 458 F.2d 942(7th Cir. 1972).

Furthermore, in as much as the Sixth Amendment right of self-representation is based on this Court's finding in Faretta of a broad "universal conviction" opposing the imposition of unwanted counsel in violation of an individual's right to present his own defense if he wants to do so, petitioner submits that the right to dismiss his unwanted counsel and unwanted appeal is a time-honored right held down through the ages and retained by petitioner by virtue of the Ninth Amendment. Any interpretation of the Sixth Amendment should not be construed to deny petitioner the broader right of self-representation inherent to citizenship in a democracy and guaranteed by the Ninth Amendment. See U.S. v. Cook, 311 F.Supp. 618(D.C.Pa. 1970).

In the recent case of Hammett v. Texas, 100 S. Ct. 2905(1980), this Court implicitly recognized a defendant's right to refuse an unwanted appeal pursued by unwanted counsel. In Hammett, counsel for a defendant sentenced to death in Texas filed with this Court, against the defendant's wishes, a petition for a writ of certiorari to review the conviction and sentence. In granting Hammett's motion to dismiss the petition, the Court found that, absent any question as to Hammett's competence, there was no reason for denying the motion to dismiss. Although no mandatory appeal statute was involved, Hammett clearly reinforces the proposition that a criminal defendant has a right to forego or

refuse any appeals of his conviction and sentence.

The significance of the Ninth Circuit's departure from the principles articulated in Faretta and practiced in Hammett is surely evident. The personal right to choose the defense to be presented on one's behalf is one of the most cherished rights guaranteed by the Constitution. The decision below would limit that right by denying petitioner's right to represent himself on appeal and thereby dismiss the unwanted appeal. Petitioner submits that such a limitation is contrary to the right of self-representation as guaranteed by the Sixth and Ninth Amendments, and as such should not be accepted without careful review by this Court.

II

The Petition Should Be Granted To Consider Whether Subjecting Petitioner to Lengthy Incarceration Pending Resolution Of An Unwanted Appeal Of A Death Sentence Constitutes Cruel and Unusual Punishment

Petitioner has been incarcerated on death row in San Quentin Prison since his conviction and sentence of death in May of 1979. This incarceration is due solely to the pendency of the appeal filed with the California Supreme Court, allegedly on petitioner's behalf but in fact against petitioner's express wishes. Having previously spent a period of 7½ years on death row,[5] petitioner is well aware of the extreme anxiety and fear accompanying incarceration pending an execution which may be set and reset interminably. Petitioner prefers to have his death sentence carried out rather than experience this unique torment a second time, and submits that the imposition of this torment by the State against petitioner's express wishes and his constitutional rights as set forth herein constitutes cruel and

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5/ Petitioner was previously sentenced to death in 1965. See People v. Massie, 66C.2d 899, 429 P.2d 869, 59 Cal. Rptr. 733(1967).

unusual punishment in violation of the Eighth and Fourteenth Amendments.[6]

This Court long ago recognized the great amount of mental suffering experienced by a person incarcerated on death row awaiting an execution. In re Medley, 134 U.S. 160(1890). Whether such mental suffering under sentence of death rises to the level of cruel and unusual punishment is a question that has not yet been addressed by this Court, and petitioner is not aware of any other court's decision directly addressing this precise issue.

In Weems v. United States, 217 U.S. 349, at 378(1910), this Court found that the Eighth Amendment prohibition of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice". Since Weems, the courts have given new meaning to the concept of cruel and unusual punishment in several cases. In Jackson v. Bishop, 404 F.2d 571, at 579(1968), the Court of Appeals for the Eighth Circuit found that the concept embodied "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." This Court has found punishments to be in violation of the Eighth Amendment when they are incompatible with "the evolving standards of decency that mark the progress of a maturing society", Trop v. Dulles, 356 U.S. 86, at 101(1958), or which "involve the unneccessary and wanton infliction of pain", Gregg v. Georgia, 428 U.S. 153(1976).

Consistent with this broad and humane concept of cruel and inhuman punishment, several courts have found confinement which caused mental suffering to be in violation of the Eighth

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6/ The Eighth Amendment prohibition against cruel and unusual punishment is applicable to the states through the due process clause of the Fourteenth Amendment. Williams v. Field, 416 F.2d 483,cert. denied 397 U.S. 1016(9th Cir. 1969).

Amendment (see Wright v. McMann, 387 F.2d 519 (2d.Cir. 1967); Sostre v. Rockerfeller, 312 F.Supp. 863(S.D.N.Y. 1970)) and in violation of "elemental concepts of decency". Jordan v. Fitzharris, 257 F.Supp. 674, at 679(N.D.Cal. 1966).

An appropriate analogy to petitioner's case is that of Trop v. Dulles, 356 U.S. 86(1958), where this Court held that the imposition of denationalization on a war-time deserter was cruel and unusual punishment. After reaffirming that the "basic concept underlying the Eighth Amendment is nothing less that the dignity of man" (id., at 100), the Court proceeded to find that denationalization was an unacceptable punishment which "subjects the individual to a fate of ever-increasing fear and distress." Id., at 102.

At the very least, Trop stands for the proposition that punishment is unconstitutional when it subjects an individual to fear and distress of sufficient intensity to violate his basic human dignity. Petitioner's incarceration is precisely that type of punishment prohibited in Trop. And unlike Trop, petitioner's suffering is made far more reprehensible because his incarceration was not brought about by himself, but by the independent action of the State in forcing the unwanted appeal upon petitioner.

The Ninth Circuit's decision below seems to imply that any rights which the petitioner may have in this respect are outweighed by the need to accomodate the State's interest in reviewing it's death sentence determinations. To the extent that such an implication would limit the prohibition against cruel and unusual punishment, it is clearly wrong. As the court held in U.S. ex. rel. Hoss v. Cuyler, 452 F. Supp. 256(1978), the prohibition is absolute and once the determination is made that a punishment is cruel and unusual, it is absolutely prohibited.

Although the Ninth Circuit did not expressly address this issue of cruel and unusual punishment in its decision below,

its implicit denial of petitioner's arguments clearly goes against the modern concept of cruel and unusual punishment as expressed by this Court and other courts. In addition, this Court is well aware of the uncertainty surrounding the legality of the many recently passed state statutes authorizing imposition of the death penalty, and is further aware of the large number of persons on "death rows" anxiously awaiting the outcomes of appeals of their death sentences. Furthermore, the Court has been presented with several recent instances where a person sentenced to death wished to forego an appeal of his sentence. See Gilmore v. Utah 429 U.S. 1012(1976); Evans v. Bennett 99 S.Ct. 1481(1979). Petitioner therefore submits that in view of the Ninth Circuit's conflict with this Court and other courts on this issue, and in view of the resurgence of the death penalty as an effective legal means of punishment and the concomitant rise in the number of persons incarcerated pending execution, fundamental notions of fairness and decency compel the Court to review this matter.

III

The Petition Should Be Granted to Consider Whether Forcing Petitioner To Take An Unwanted Appeal Subjects Petitioner to Double Jeopardy

Petitioner asserted in his habeas corpus petition below that the unwanted appeal mandated by Section 1239(b) subjects him to the probability of undergoing an endless number of retrials for the same offense, and as such places him in danger of double jeopardy in violation of the Fifth and Fourteenth Amendments.[7]

This Court stated in Green v. United States, 355 U.S. 184, at 187(1957), that the underlying idea of the prohibition

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7/ The Fifth Amendment prohibition against double jeopardy is applicable to the states through the due process clause of the Fourteenth Amendment. North Carolina v. Pearce, Ala. & N.C., 395 U.S. 711(1969).

against double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety . . . ." This is precisely what is allowed and condoned by Section 1239(b), and without this Court's assistance petitioner is powerless to stop the process.

Although it is well settled that one who seeks reversal of his conviction cannot claim double jeopardy upon retrial (see Forman v. U.S., 361 U.S. 416(1960)), that is not the case here. Petitioner had adamantly expressed his wishes to forego an appeal and avoid a retrial. Furthermore, petitioner's contention here is ironically pointed out in People v. Powell, 40 Cal.App.3d 107 115 Cal. Rptr. 109(1974), where the court was faced with appellants who had claimed double jeopardy upon retrial following an appeal pursuant to Section 1239(b). The Appellants in Powell argued that the appeal did not constitute a waiver of their right to claim double jeopardy, because the appeal was mandatory and not specifically requested by the appellants. The court did not agree with appellants, on the basis that the appeal was "beneficial" to them. The court then stated: "The fallacy of appellants' contention is fully exposed if the alternative is pondered. It is unbelievable that [appellants] would have foregone the appellate process and elected to proceed to the gas chamber." Id., at 143. Likewise, the fallacy of the Ninth Circuit's decision below is equally exposed when one considers that petitioner's wish to forego an appeal is exactly the "unbelievable" choice contemplated in Powell. Therefore, the Section 1239(b) appeal taken against petitioner's wishes cannot act as a waiver of his right to be free from double jeopardy.

It is no answer to claim that petitioner must wait until an actual retrial to claim double jeopardy. The damage to

petitioner in the form of subjecting him to "embarrassment" and "ordeal, and compelling him to live in a continuing state of anxiety" while his unwanted appeal is pursued by the State, has already occurred and continues to occur even now. To allow the state to pursue a conviction which it has already lawfully obtained is to sanction an unacceptable abuse of the prosecutorial power of the State, and to extract from petitioner a pound of flesh that is clearly prohibited by the Fifth Amendment prohibition against double jeopardy.

Petitioner submits that the decision of the Ninth Circuit below, in implicitly denying petitioner's contentions on this matter, is in opposition to this Court's interpretation of the double jeopardy prohibition of the Fifth Amendment. For this reason and the reasons for review of Section 1239(b) previously given, this question is a proper matter for review by this Court.

IV

The Petition Should Be Granted To Consider Whether Incarceration Pending Resolution Of An Unwanted Appeal Of A Death Sentence Constitutes Involuntary Servitide

The Thirteenth Amendment prohibits "involuntary servitide except as a punishment for crime whereof the party shall have been duly convicted . . . ." Petitioner submits that his lengthy incarceration pending resolution of the unwanted appeal is in excess of the punishment lawfully pronounced pursuant to his conviction, and is therefore involuntary servitude which is prohibited by the Thirteenth Amendment.

Several courts have found incarceration to be in violation of the Thirteenth Amendment when pursuant to an unlawful conviction, see U.S. ex rel. Caminito v. Murphy, 22 F.2d 698(2d. Cir. 1955), cert. denied 350 U.S. 896; U.S. v. Morgan, 222 F.2d 673(2d Cir. 1955). Given the plain language of the Amendment, it is equally clear that punishment which is in excess

of the sentence given pursuant to a lawful conviction is prohibited by the Amendment. To hold that a state may lawfully subject an individual to additional punishment which was not meted out by the trial court in lawful exercise of its jurisdiction is to work a travesty of the Thirteenth Amendment. Such a holding is implied by the silence of the circuit court below in this matter, and opens the door to potential abuses of prisoners by the States. For this reason, this question presents an appropriate matter for review by the Court.

CONCLUSION

Petitioner submits that this Court should closely scrutinize a device such as Section 1239(b) which prevents a criminal defendant from exercising control over the outcome of his case and his ultimate destiny, and thereby offending traditional, common sense notions of fairness and justice. For this and the foregoing reasons, this petition should be granted.

Dated: October 2, 1980.

Respectfully submitted,

RANDALL C. BRUMMITT
Attorney for Petitioner

APPENDIX A

ORIGINAL

DOCKETED

ARMS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT LEE MASSIE, Petitioner-Appellant, vs. GEORGE SUMNER, Warden, San Quentin State Prison, Respondent-Appellee.	No. 79-2703 C-79-1660-SW OPINION

Appeal from the United States District Court for the Northern District of California

Before: DUNIWAY, ANDERSON and TANG, Circuit Judges.

TANG, Circuit Judge:

Robert Lee Massie, a state prisoner, appeals the district court's order dismissing his habeas petition. By this habeas corpus action, Massie challenges the validity of California Penal Code § 1239(b), which provides for an automatic appeal to the California Supreme Court from a sentence of death. Massie seeks to waive this automatic appeal, contending that his incarceration on death row in San Quentin State Prison pending determination of the forced and unwanted appeal constitutes cruel and unusual punishment and violates his right to refuse counsel under Faretta v. California, 422 U.S. 806 (1975). Apparently, Massie has no desire to be executed and does not object to spending the rest of his life incarcerated; he, however, finds execution preferable to spending a lengthy period incarcerated on death row.

Facts:

In May 1979, Massie pleaded guilty to murder in the first degree and robbery, violations of California Penal Code §§ 187 and 211. Waiving his right to counsel, Massie

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admitted that he had previously been convicted of murder in the first degree[1] and that the murder to which he was pleading guilty was committed while he was engaged in the commission of a robbery. The death sentence was imposed by the trial court on May 25, 1979.

Pursuant to California Penal Code § 1239(b), an appeal from this judgment was taken automatically and is now before the California Supreme Court.[2] The California Supreme Court denied Massie's motion to dismiss the appeal, denied reconsideration of its denial, and appointed the State Public Defender to represent him in the proceedings.

On July 9, 1979, Massie filed this petition for writ of habeas corpus in the district court. Relying on his Sixth Amendment guarantee of self-representation, Massie contends that an automatic, unwaivable appeal of his death conviction constitutes cruel and unusual punishment in violation of the Eighth Amendment, and deprives him of due process of law. Massie stresses that he is not challenging the validity of the California automatic appeal statute per se, but only as applied to him individually against his wishes.

At the September 21, 1979 district court hearing on his habeas petition, Massie was not allowed to be present nor was he represented by counsel. The Federal Public Defender had been appointed to represent him, but had been allowed to withdraw because it could not ethically present Massie's arguments. Massie's petition was dismissed by the district court on October 3, 1979, on the grounds that:

> "Petitioner has failed to establish a violation of his constitutional rights. Petitioner has not shown that his incarceration by the state during the period necessary to determine his

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automatic appeal is cruel and unusual punishment."

Massie appeals from this judgment of the district court.

Discussion:

Relying on Faretta v. California, 422 U.S. 806 (1975), Massie argues that there is no meaningful difference between forcing an automatic appeal upon a defendant and forcing unwanted counsel upon him. The state asserts, however, that while a litigant may waive the advantage of a law intended solely for his benefit, he may not waive a law established for a public reason.

The California courts have held that a defendant, sentenced to death, may not waive the automatic appeal provisions of California Penal Code § 1239. People v. Stanworth, 71 C.2d 820, 80 Cal. Rptr. 49, 457 P.2d 889 (1969); People v. Powell, 40 Cal. App. 3d 107, 115 Cal. Rptr. 109 (1974), cert. denied 420 U.S. 994 (1975). In this and other contexts, it has been held that a defendant's waiver or attempted waiver of a right is ineffective where it would also involve the renunciation of a correlative duty imposed upon the courts. Stanworth, 457 P.2d at 898; People v. Werwee, 112 Cal. App. 2d 494, 246 P2d 704 (1952). In Stanworth, the Supreme Court of California stated that while a defendant, sentenced to death, has a right to an automatic review of his conviction, the court likewise has a duty to conduct such a review. 457 P.2d at 898. The California Court could not avoid nor abdicate this duty, merely because the defendant wished to waive his parallel right. Id. at 898. See also People v. Powell, supra (". . . a substantial benefit is afforded by this procedure (the

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automatic appeal), both to the accused and to society, when the most severe of all penalties has been imposed"). Addressing this question, the Supreme Court of Pennsylvania commented:

> ". . . It is evident from the record that Gerard McKenna personally prefers death to spending the remainder of his life in prison. While this may be a genuine conviction on his part, the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide. The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue - the propriety of allowing the state to conduct an illegal execution of a citizen."

Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978).

While Massie is correct in that he enjoys a constitutional right to self-representation, this right is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings. U.S. v. Taylor, 569 F.2d 448 (7th Cir.), cert. denied, 435 U.S. 952 (1978). Similarly, while a defendant may in some contexts enjoy the right to refuse appeals and legal proceedings instituted in his behalf, see e.g. Bishop v. State, 597 P.2d 273 (Nev. 1979), this right is also limited and a state may require reasonable proceedings in order to protect its own interests in the fairness of its determinations. In the same sense that a state may constitutionally require competency evaluations, a factual basis for a guilty plea, and other routinely accepted proceedings, it may also require a higher court review of a death sentence and conviction.

In the instant case, the reasons for this rule become manifest. No hearing was ever held on Massie's competency and there appear to be substantial questions regarding the

entire guilty plea and sentencing process, including Massie's waiver of counsel.[3] The state of California has a strong interest in the accuracy and fairness of all its criminal proceedings; this interest is most pronounced in a case such as this where a defendant pleaded guilty and was sentenced to death without the assistance of counsel.

We do not today decide the question whether the conditions of Massie's present confinement on death row constitute cruel and unusual punishment in violation of the eighth amendment. Relief for certain of his complaints may be available under 28 U.S.C. § 1983, but the remedy for an eighth amendment violation is not for this court to order his execution, as Massie requests in this habeas action. We thus decline to do so.

The order of the district court is affirmed.

FOOTNOTES

[1]See People v. Massie, 66 C.2d 899, 59 Cal. Rptr. 733, 428 P.2d 869 (1967). (Massie was previously confined on death row for 7-1/2 years under the prior murder conviction.)

[2]Under California Penal Code § 190.6, Massie's automatic appeal must be decided expeditiously, within 150 days from the time the record is certified on appeal.

[3]From the record available, it appears that Massie's court appointed counsel refused to represent him unless he agreed not to waive a jury in the penalty phase of the trial. Wishing to waive his right to a jury, Massie proceeded in propria persona. When Massie requested that standby counsel be permitted to sit at the counsel table with him, the trial court denied this request. The trial court did, however, permit Massie to take all of the time that he wanted to take to communicate with standby counsel either in person or in writing.

APPENDIX B

ORIGINAL

ARMS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOCKETED

ROBERT LEE MASSIE, Petitioner-Appellant, vs. GEORGE SUMNER, Warden, San Quentin State Prison, Respondent-Appellee.	No. 79-2703 C-79-1660-SW ORDER

Before: DUNIWAY, ANDERSON and TANG, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

August 12, 1980

MEMORANDUM

TO: Clerk Deane

FROM: Judge Tang

RE: Massie v. Sumner - No. 79-2703

Please file the enclosed Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc.

I certify all Judges named in the Order concur.

U.S. Circuit Judge

TT/pb
Enclosures

cc: Judge Duniway
Judge Anderson

FILED
OCT 1 1980
RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

APPENDIX C

FILED

OCT - 3 1979

WILLIAM L. WHITTAKER
CLERK, U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LEE MASSIE, Petitioner, v. GEORGE SUMNER, Warden San Quentin State Prison, Respondent.	NO. C-79-1660 SW

ORDER OF DISMISSAL

Petitioner Robert Lee Massie is currently incarcerated at San Quentin Prison, Tamal, California. Petitioner plead guilty in May of 1979 to violations of California Penal Code sections 187, 211 (murder in the first degree and robbery). The judgment of death was entered by the Superior Court of the State of California for the City and County of San Francisco on May 25, 1979. Pursuant to California Penal Code section 1239(b), an appeal from this judgment was automatically taken and is now pending before the California Supreme Court. Petitioner's attempt to waive and/or dismiss the automatic appeal was denied by the Supreme Court, and he is currently incarcerated at San Quentin pending outcome of its consideration on the merits.

Petitioner contends that his incarceration pending

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determination of an appeal he does not wish to pursue amounts to the infliction of cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

The prerequisite for granting relief in habeas corpus is a determination that petitioner's custody violates the Constitution, laws, or treaties of the United States. Title 28 U.S.C. § 2241; Townsend v. Sain, 276 F.2d 324 (7th Cir. 1960), 372 U.S. 293 (1963). Petitioner has failed to establish a violation of his constitutional rights. Petitioner has not shown that his incarceration by the state during the period necessary to determine his automatic appeal is cruel and unusual punishment.

Petitioner recounts his prior confinement on death row for seven and one-half years and the many execution dates and stays he was forced to endure in support of his claim of cruel and unusual punishment. He claims the state automatic appeal procedure will force him to be in limbo again and that this is psychological torment. This court notes however that petitioner was sentenced on the instant offense in May 1979. His appeal began immediately thereafter and pursuant to California Penal Code § 190.6, which requires capital cases to be decided expeditiously, should be decided before December 28, 1979. The court does not find a seven month wait for execution to be cruel and unusual. This court notes however that petitioner's incarceration may become cruel and unusual if § 190.6 is not enforced and petitioner is forced to suffer a prolonged appeal or intervention.

The State of California has the right to enact legislation to protect those upon whom the death penalty has been imposed and to require that those procedures be

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utilized. People v. Stanworth, 71 Cal. 2d 820, 80 Cal. Rptr. 49 (1969). The automatic appeals procedure challenged by petitioner has been upheld as a benefit to petitioner and society. People v. Powell,. 40 Cal. App. 3d 107, 115 Cal. Rptr. 109 (1974). The California Supreme Court has found the people of the State of California have a legitimate interest, independent of petitioner's, in the accuracy of death penalty determinations. People v. Stanworth, 71 Cal. 2d 820, 80 Cal. Rptr. 49 (1969). The court also noted that while an individual may wish to waive his appeal the state interest in the matter prevents him from doing so. See, People v. Teron, 23 Cal. 3d 103, 115, fn.7 (1979), Petitioner has failed to establish to the satisfaction of this court that his right to waive the (state automatic appeals) procedure outweighs the right of the State of California to insure accuracy in death penalty determinations. for the foregoing reasons his petition must be dismissed.

Petitioner's request is for habeas corpus relief (immediate release from unconstitutional incarceration). Yet, the character of petitioner's claims (cruel and unusual conditions of punishment) and the specific relief sought (injunction forcing the state to carry out his execution) might also be characterized as coming under 1983. However the court doubts that the results would differ regardless of which is found to be the proper basis for the claim.

Petitioner's request differs from more traditional habeas corpus petitions before this court in that the ultimate relief, or release, he seeks is death itself. The court having denied the habeas corpus petition for the reasons stated above would dismiss a 1983 claim for the

same reasons: Petitioner cannot unilaterally dismiss the automatic appeal and a seven month incarceration while awaiting the outcome of the appeal is not cruel and unusual punishment.

In the event an appeal is taken from the dismissal of this petition, a certificate of probable cause for appeal should be granted. 28 U.S.C. § 2253; Fed.R.App.P. 22(b). The Ninth Circuit has ruled that some question of "substance" must appear before a certificate of will be issued. Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977. This court finds that petitioner's petition for habeas corpus is not frivolous, questions of substance were presented, and a certificate of probable cause should be granted.

IT IS SO ORDERED.

DATED: 10-3-79

James Williams
UNITED STATES DISTRICT JUDGE

APPENDIX D

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U.S. DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LEE MASSIE

Petitioner,

v.

GEORGE SUMNER, Warden,
San Quentin State Prison,

Respondent.

No. C 79-1660
ORDER

Petitioner, Robert Lee Massie, moves this court to reconsider its decision dismissing his petition for writ of habeas corpus and to convene a three-judge court to rehear the questions presented by his petition. In the alternative, Petitioner requests the court to rescind its judgment and to issue an injunction staying the automatic appeal now pending in the California Supreme Court pending appeal of this court's decision in the United States Court of Appeals for the Ninth Circuit. Petitioner has also noticed his appeal to the Ninth Circuit. Pursuant to that appeal he has moved to proceed in forma pauperis. He has also asked that a complete copy of the record of the proceedings before this court be provided to the Court of Appeals and to the petitioner at government expense. This court having considered the motions and for good cause appearing finds the

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following:

The motion to reconsider and to convene a three-judge court to rehear the questions presented by the petitioner in his original petition is denied.

The motion to rescind the judgment and issue an injunction staying the automatic appeal now pending in the California State Supreme Court is denied.

Petitioner's motion for a complete record, with costs to be paid by the United States pursuant to 28 U.S.C. 753(f) is granted. Petitioner's motion for leave to proceed in forma pauperis is moot since Federal Rule of Appellate Procedure 10(a) provides that when the petitioner was in forma pauperis before the district court and the court certifies the appeal is taken in good faith a second motion for leave to proceed in forma pauperis before the Court of Appeals is not required.

Memorandum with points and authorities to follow.

DATED: OCT 31 1979

UNITED STATES DISTRICT JUDGE

ARMS → FILE.

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT LEE MASSIE,

Petitioner/Appellant,

vs.

GEORGE SUMNER, Warden, San Quentin State Prison,

Respondent/Appellee.

No. 79-2703

DC CV 79-1660 SW

APPEAL from the United States District Court for the Northern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 30, 1980

APPENDIX F

United States Constitution, Amendment Five

. . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb . . . .

United States Constitution, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment Eight

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment Nine

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment Thirteen §1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

United States Constitution, Amendment Fourteen §1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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California Penal Code §1239(b)

When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel. If the defendant is unable to afford the services of counsel, the Supreme Court shall appoint counsel to represent him to any appeal to the Supreme Court, or any appeal or other review in the Supreme Court of the United States.

California Penal Code §190.6

The legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of cerification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

(The following proceedings were had in chambers outside the presence of the prospective jurors:)

THE COURT: Good morning, again, Mr. Massie. The record will show that we are in chambers outside the presence of a prospective jury in this case.

It has been brought to my attention by counsel for the defendant, Robert Massie, that at this time he wished to withdraw not guilty pleas and denial of the truth of special circumstances, and change his pleas on that issue. And at this time, we are here to determine whether that is indeed prior to going out and selecting a jury in this case, if that is to be a consideration. Gentlemen?

THE DEFENDANT MR. MASSIE: Yes, it is.

THE COURT: Who is going to represent Mr. --

MR. GAINES: Your Honor, I will handle this.

THE COURT: First of all, is there such a motion to withdraw previous entered pleas in this case?

MR. GAINES: Your Honor, at the outset, I'd just like to be heard briefly.

THE COURT: Yes.

MR. GAINES: The Court is aware that this is a serious case. It's nine counts, including count one charging murder with two allegations of special circumstances.

And this proceeding that we are about to enter into which would be a waiver of constitutional rights and pleas of guilty to the substantive counts, I believe is being entered into by Mr. Massie above and beyond the advice of counsel.

We are ready to proceed with the guilt phase of this trial.

It's my understanding that -- I've talked to Mr. Massie about this extensively this morning -- that it is his desire to waive his right to a trial, jury or court trial, on the issue of the guilt phase and the special circumstances.

I've advised him that this, pleading guilty in this fashion and admitting the truth of the special circumstances, would involve the penalty, the very least, of life imprisonment without possibility of parole. And based on that, you are still prepared to enter a plea of guilty to the information and the charge?

THE DEFENDANT MR. MASSIE: Yes. I'd like to address the Court, though, prior to the recess of these proceedings.

THE COURT: You mean at this time or prior to the taking of the pleas?

THE DEFENDANT MR. MASSIE: At whatever time you desire, your Honor.

THE COURT: Does it relate to your desire to enter a plea of guilty as to the charge?

THE DEFENDANT MR. MASSIE: Yes, it does.

THE COURT: And how does that relate? Is this with the advice of counsel?

THE DEFENDANT MR. MASSIE: There was a witness downstairs that I was informed of by counsel who could attest to the fact that not only was I intoxicated and sick when I came into this jail, but I was given medication for that sickness and withdrawal.

And if I was sick, then I was certainly sick prior -- at the time of interrogation. I happened to have been telling the truth when I told you that I asked for attorneys when I came in

here.

However, both officers have gotten on the stand and said the contrary. Okay. Fine. That's the way it is.

At this point, I see no reason to pursue this, what is to me, a farce and a sham. I will just as soon go ahead, let the preliminary transcripts stand as they are, and as to the guilt -- or if the prosecution desires, they can put on more witnesses.

But I just like the guilty plea to stand. I'd like a penalty trial period. And let it go at that.

MR. GAINES: Your Honor, I should indicate that it's my understanding that as we are not submitting the matter on the preliminary transcript, we would not concur in such a procedure. We are going to try the case. Going to try the case.

MR. LASSART: Maybe I could help a little bit. The People won't waive a jury in this case. Without a jury waiver, the only way that it can be tried is with the jury or a plea. That's it.

THE COURT: I understand.

THE DEFENDANT MR. MASSIE: In that case, I'll just dismiss counsel and represent myself, and I'm waiving the jury and --

THE COURT: On the issue -- we're getting ahead of yourself there, Mr. Massie.

On the issue of liability, that is guilt or innocence of the charges for which you stand and the truth or falsity of the special circumstances, counsel has represented that you wish to enter pleas or change your pleas on those.

If you don't change your pleas, as I understand it, the matter will proceed to a jury trial because the People will not

be waiving their right to a jury trial.

On the issue of guilt or innocence, changing your pleas takes the matter out of issue, but I don't want you to change your pleas merely for accommodation.

THE DEFENDANT MR. MASSIE: I'd just like to get the matter over with, your Honor. Like I said, I see it as a farce and sham from this point on, and I've been through this process before. I know what it entails. And I can predict the probable outcome.

THE COURT: Mr. Gaines, you want to proceed in this issue?

MR. GAINES: You are referring to the pleas of guilty, your Honor?

THE COURT: If you want to consult with your client about that. Is that how he's going to proceed?

MR. GAINES: Is that what you want to do?

THE DEFENDANT MR. MASSIE: Mr. District Attorney, are you --

THE COURT: He cannot talk to you person to person.

MR. LASSART: Your Honor, I'll speak to the Court so that Mr. Massie can understand my thinking, the People's position, so that if he's got a question in his mind about the penalty phase. I'll make it very clear to him.

Once the pleas are in, as I've told this Court, our position is that we will waive the jury with respect to the penalty phase of the case. That takes consent of other parties, but that's our position.

Once the pleas are in, we will try the penalty phase in front of the judge. If that's what Mr. Massie's question was, and I anticipated that is where it is coming from.

THE DEFENDANT MR. MASSIE: Right, exactly.

THE COURT: Mr. Gaines?

MR. GAINES: Mr. Massie, should we proceed then on the admonition as of the pleas of guilty to the charges in the information?

THE DEFENDANT MR. MASSIE: They have already been read. I understand them.

MR. GAINES: The charges, I understand. We just have to -- I have to advise you of your constitutional rights on the record, that you waive same. And that you have to enter a plea of guilty and admit that each allegation in the information --

THE DEFENDANT MR. MASSIE: I do so en masse.

MR. GAINES: I don't believe that the Court will accept a plea en masse without a proper waiver of constitutional rights.

THE COURT: That's right.

MR. GAINES: Shall we proceed?

THE DEFENDANT MR. MASSIE: If you feel like it. Go ahead.

MR. GAINES: This is being done against the advice of counsel. What we are asking is: Do you wish to enter a plea of guilty? That was your statement to me this morning.

THE DEFENDANT MR. MASSIE: Yes.

MR. GAINES: All right, sir. Mr. Massie, I'm going to make a statement to the Court about your case, and it's very important that you listen to it carefully.

Your Honor, Mr. Massie wants to enter pleas of guilty to the nine substantive counts in the information. If I might, your Honor, go slowly through this.

Count 1, charging murder. Count 2, charging robbery.

Count 3, charging assault by means of force likely to produce great bodily injury. Count 4, charging possession of a firearm by one who has previously been convicted of a felony. Count 5, charging robbery. Count 6, charging possession of a firearm by a person who has previously been convicted of a felony.

Count 7, robbery. Count 8, possession of a firearm by a person who has previously been convicted of a felony. Count 9, possession of a firearm by a person who has previously been convicted of a felony.

Your Honor, furthermore, as to -- there are several enhancements pled. As to Count 1, there is the use of a firearm allegation and later in the information, Your Honor, on Page 4, two allegations of special circumstances pursuant to 190.2 subdivision A, subdivision 2, and 190.2 subdivision 17, Roman Numeral I:

One, that the defendant was previously convicted of the offense of murder of the first or second degree. And, secondly, that the murder was committed while the defendant was engaged in the commission or attempted commission or flight after the commission or attempted commission of robbery in violation of Section 211.

As to Count 2, Your Honor, the use of a firearm allegation as to Count 3, the use of a firearm allegation, as to Count 5, Your Honor, the use of a firearm allegation, as to Count 7, the use of a firearm allegation, I believe the allegations of prior convictions pursuant to section 667.5(b) and (a) have previously been admitted?

THE COURT: That's correct.

MR. GAINES: Now, your Honor, I've told him that several constitutional rights will be given up if the Court accepts these pleas, including, first, his privilege against self-incrimination. That is, he is under no obligation to say anything that may tend to incriminate him.

Told him that by pleading guilty, he would be in fact incriminating himself. Second, his right to be tried by a jury. In this regard, I advised him that he cannot be convicted unless all twelve jurors agree that the prosecution has proved his guilt beyond a reasonable doubt.

Third, his right to see and hear his accusers testify in open court in his presence and to have his attorney cross-examine them.

We have discussed the elements of the charges and the possible defenses thereto. I've advised him of the law as it relates to the facts of this case, and I've advised him the legal consequences of a guilty plea to this charge.

And, your Honor, if -- the upshot of this in entering a plea of guilty to Count 1 and admitting the special circumstances to be true, the penalty, it's not a possible penalty under the present law, but the penalty at the very least is life imprisonment without the possibility of parole.

THE COURT: The maximum possible penalty is death.

MR. GAINES: And the maximum possible penalty would be death depending on the outcome of a penalty trial.

Your Honor, this plea is offered as results of discussions with my client, and we have discussed the matter carefully.

I believe the plea is -- well, the plea is being offered

against the advice of counsel at this time. However, it's my understanding that Mr. Massie is adamant and wishes to enter pleas of guilty at this time.

THE COURT: And for that reason, you do not withhold your consent; is that correct?

MR. GAINES: That is correct, your Honor. And I don't see that we can go any further with this matter with the state of the case as it is and my client's wishes.

MR. LASSART: Your Honor, may I just add one thing?

THE COURT: Yes.

MR. LASSART: The murder is alleged as a murder in the first degree.

THE COURT: I understand that.

MR. LASSART: Just to make sure that --

THE COURT: Okay.

MR. GAINES: Yes, your Honor. That occurred to me at the time I was reading that it's my understanding that the determination of penalty is not being left to the Court, or an issue, and that, in effect, the plea is a plea to murder in the first degree.

MR. LASSART: You are correct. I think you misspoke. It's not the determination of penalty, but it's the determination of the degrees now left to the Court.

MR. GAINES: Excuse me. All right. Agreed. Yes, that this is a plea to murder in the first degree. Sorry.

THE COURT: All right. Robert Lee Massie, you have heard the statements made to the Court by your counsel, and are they true in all respects?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: As to the charges and the enhancements and the use of a firearm allegation as set forth, do you personally give up your privilege not to incriminate yourself?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you personally give up your right to be tried by a jury?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you personally give up your right to be tried by a jury?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you personally give up your right to see and to question the witnesses against you?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Now, I must advise you that if you are not a citizen, you are hereby advised that conviction of the offenses for which you have been charged may have the consequences of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States, and do you understand that?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Are you presently under the effect of any drug or medication?

THE DEFENDANT MR. MASSIE: No.

THE COURT: The acceptance of your plea at this time is not binding on the Court, and if the Court later withdraws its approval at the time for sentencing, you will be allowed to take back your guilty plea and enter a plea of not guilty if

you wish to do so. Do you understand that?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you feel that in any way you have been forced or coerced to enter these pleas of guilty?

THE DEFENDANT MR. MASSIE: No.

THE COURT: And the Court is, first, taking these pleas and is not discussing at this moment the special circumstances. We will come back to that, gentlemen.

Robert Lee Massie, what is your plea to violating section 187 of the California Penal Code, murder in the first degree, to wit, the murder of Boris G. Naumoff, a human being, as set forth in Count 1 of the information?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: Do you admit or deny that in the commission or attempted commission of that offense, you did personally use a firearm within the meaning of 12030& and 12022.5?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Yes means you admit that; is that correct?

THE DEFENDANT MR. MASSIE: (Nods head.)

THE COURT: Robert Lee Massie, what is your plea to violation of section 211 of the California Penal Code as set forth in Count 2 of the information, to wit, robbery of one Boris G. Naumoff?

THE DEFENDANT MR. MASSIE: Robbery of him?

THE COURT: Yes, sir. How do you plead to that charge?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: Do you admit or deny that in the commission or attempted commission of that offense, you personally used a

firearm?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: How do you plead to the charge of 245(a) of the California Penal Code, assault upon one Charles Harris as set forth in Count 3 of the information?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: Do you admit or deny that in the commission or attempted commission of that offense, you did personally use a firearm?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: What is your plea to violation of section 12021 of the California Penal Code as set forth in Count 4 of the information, possession of a concealable firearm on the 3rd day of January, 1979?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: What is your plea to violating section 211 of the California Penal Code, robbery, on January 2nd, 1979, of one Yasphine Khashen?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: Do you admit or deny that in the commission or attempted commission of that offense, you did personally use a firearm?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: How do you plead to the charge of 12021 as set forth in Count 6 of the information that on the 2nd day of January, you did have in your possession and under your custody and control a concealable firearm?

THE DEFENDANT MR. MASSIE: Guilty.

//

THE COURT: How do you plead to Count 7 of the -- pardon me. Strike that.

How do you plead to the charge of 211 of the California Penal Code as to Count 7 of the information, alleging a robbery on the 3rd day of January from one George Shatara?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: Do you admit or deny that in the commission and attempted commission of that offense, you were personally -- you did personally use a firearm?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: How do you plead to the charge of 12021 of the California Penal Code as set forth in Count 8 of the information, that on or about the 3rd day of January, 1979, you did have in your possession a concealable firearm?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: How do you plead to the charge of 12021 of the California Penal Code as set forth in Count 9 of the information, that on the 4th day of January, you did have in your possession and under your control a certain two concealable firearms?

THE DEFENDANT MR. MASSIE: Guilty.

THE COURT: The Court finds that the defendant -- strike that. Betty, could you get the preliminary hearing transcript from my desk? I just want to review it, gentlemen. Although we've discussed aspects of the case, I want to make a finding on review.

MR. LASSART: May I discuss with the Court and bring to the Court People's Trial Binder in this matter? I would also

like the Court to look at the ballistics finding in this case which were not evidence in this case as a portion of the finding of voluntariness of this and the validity of the plea.

THE COURT: So that it's clear, I'm reading the direct examination of each witness. And understanding that full examination, it does involve cross-examination. I'm doing this to determine the propriety of this plea and would feel that it would have to be established by that evidence.

THE DEFENDANT MR. MASSIE: Can I stipulate to the accuracy of the information contained in that preliminary transcript?

THE COURT: It's certified. So it would have to be. Thank you.

THE DEFENDANT MR. MASSIE: Okay.

(Court reviewing transcript.)

THE COURT: The Court has reviewed the testimony of the witnesses produced at the preliminary hearing. Dr. Boyd G. Stephens; Sandra Bateman, Charles William Harris; Kenneth Ross; Yasphine, Y-a-s-p-h-i-n-e, Khashen, K-h-a-s-h-e-n; Calvin Barnes, B-a-r-n-e-s; George Shatara, S-h-a-t-a-r-a; Norman Clark.

The Court has also heard the transcription of the statements of the defendant made to the inspectors which was received as Court's Exhibit 3. From the review of this evidence, the Court finds that the --

MR. LASSART: Excuse me, your Honor. Can I just -- I would like to just add some other --

THE COURT: Certainly.

MR. LASSART: -- items to the Court.

MR. GAINES: Can I make one point at this time? I think I'd be derelict in not. There is a very strong possibility that the Court will be the sole arbitor of the facts in this case.

If the Court has made a sufficient finding at this time from the transcript that there is factual basis for the pleas, I think it might not be appropriate -- I can't say that it's illegal -- for the Court to review further evidence at this time perhaps.

I would draw that to the Court's attention if it wants to be in that position.

MR. LASSART: To be very frank with the Court, it's my intention that the Court should understand the physical evidence, scientific evidence in the case to understand that there is more of a basis than merely the testimony that you heard thus far.

I don't think it's any dispute about the validity of the ballistics evidence and the match or the blood sample and the testing of the clothing.

Those are -- plus the powder pattern on the clothes.

MR. GAINES: See, in the abstract, I think the Court will hear this evidence. The People are making an offer of proof now. Do you think that would be sufficient, Judge?

THE COURT: Well, the offer of proof obviously in and of itself would not be.

But perhaps Mr. Gaines does have a point, Mr. Lassart. And having reviewed the direct testimony and having heard the statements of the defendant, that would be sufficient for the Court to conclude that there is sufficient evidence upon which

to have this plea entered and accepted by the Court.

MR. LASSART: Your Honor, viewing the direct evidence in the case minus the statement of the defendant, would the Court still feel there is a sufficiency to enter the plea?

THE COURT: Yes.

MR. LASSART: Fine. I have no problem.

MR. GAINES: Thank you, your Honor.

THE COURT: All right. The Court, then, having read and considered the preliminary hearing transcript direct testimony, and the statements and also the statement made by defendant, finds there is a factual basis for the plea entered by the defendant and further finds that the defendant had been informed of his rights and that he has voluntarily and intelligently waived those rights, and that he has entered the plea of guilty as to the charges put forth in the information and admission of the use of firearm allegation as set forth in the pertinent counts well knowing the consequences of each plea.

Therefore, the plea as to each count will be accepted.

Now, as to the issue of special circumstances, Mr. Massie, you have heard the statements made by your counsel in that regard and the advice they have given you, that is the advice they have stated to the Court that they have given you.

Are those statements true in all respects?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you understand that by admitting the prior circumstances and giving up and waiving your rights to a trial on those issues, that the matter would proceed then to a penalty phase wherein the maximum penalty could be death and the minimum

penalty could be life without possibility of parole; do you understand that?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: All right. Now, as to the issue of the special circumstances alleged in the information, do you personally give up your privilege not to incriminate yourself?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you personally give up your right to be tried by a jury?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you personally give up your right to see and to question the witnesses against you?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Are you presently under the effect of any drug or medication?

THE DEFENDANT MR. MASSIE: No.

THE COURT: Robert Lee Massie, do you admit or deny that during the commission of the offense set forth in Count 1 of the information, to wit, the murder in the first degree of Boris G. Naumoff, that you did, Robert L. Massie, cause the death of Boris Naumoff under the following special circumstance:

That you -- that the defendant was previously convicted of an offense of murder of the first or second degree?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: And Robert L. Massie, do you admit or deny that you caused the death of Boris Naumoff and the following special circumstances exist:

That the murder was committed while the defendant was

engaged in the commission or attempted commission or flight after the commission or attempted commission of robbery in violation of section 211 of the Penal Code?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: And by saying "yes" you admit that?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: The Court having read the preliminary hearing transcript and also having reviewed the statements made by the defendant, find there is a factual basis for the admission of the special circumstances entered by the defendant, and further finds that the defendant has been informed of his rights, and that he has voluntarily and intelligently waived those rights, and that he has entered the admissions well knowing the consequences of those admissions.

Just one final question, Mr. Massie. In admitting the allegations of special circumstances, have you been forced or coerced in any way to admit those special circumstances?

THE DEFENDANT MR. MASSIE: No.

THE COURT: All right. Then the admissions of the special circumstances will be entered. Gentlemen, this brings us now to the issue of the penalty phase of the trial. And --

THE DEFENDANT MR. MASSIE: Can we have that today, too?

THE COURT: The jury is available. And the question is whether the matter is going to proceed by jury.

THE DEFENDANT MR. MASSIE: No, no. Just you.

THE COURT: You just want the Court to hear that; is that correct?

THE DEFENDANT MR. MASSIE: Right.

MR. LASSART: People will waive their right to a jury, as I told Mr. Massie before here on the record, and it's my intent to do so.

THE DEFENDANT MR. MASSIE: I'd like the matter tried and the penalty decided today. And sentenced today if possible, and get the whole matter out of the way.

THE COURT: Well, under certain procedures, it all can't be done today but --

MR. GAINES: Your Honor, I realize this is -- I didn't expect this. Could I have a brief opportunity to talk to my co-counsel?

THE COURT: You may have a moment to talk to your co-counsel and to discuss the matter with Mr. Massie if you wish.

MR. GAINES: I'd appreciate it, Judge.

THE COURT: We'll take five minutes off the record, please.

MR. GAINES: Thank you.

(Recess.)

THE COURT: Let the record reflect, the recess having been concluded, that we are back in chambers with all the attorneys, Mr. Massie and the attaches of the Court.

And at this time, counsel wanted to address the Court.

MR. GAINES: Yes, your Honor. We now reach the -- what would have been the third phase of the trial. The penalty phase.

It's my understanding that my client wishes to waive a jury in that regard. This is over the advice of counsel and, in fact, in good conscience, your Honor, I cannot concur in such a waiver.

And no offense to this Court as an arbitor of facts, but I feel a jury is appropriate. However, it's my understanding that Mr. Massie is adamant in his desire not to have this matter tried by a jury. He wishes to waive a jury.

And in accordance with law, wishes to dismiss Mr. Berman and myself as his trial counsel and to conduct the action in a pro per fashion. Is that a correct statement?

THE DEFENDANT MR. MASSIE: Yeah.

MR. GAINES: We would only ask in that regard, your Honor, that Mr. Berman and myself be appointed as standby counsel in an advisory capacity and to perform whatever functions the Court desires in accordance with law. That's where we're at.

THE COURT: Mr. Massie, based on your counsel's representation, it's my understanding you wish to give up your right to a jury trial on the issue of the penalty of this case?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: First of all, you understand that the penalty -- there is only two choices -- the penalty may either be life without possibility of parole or death?

THE DEFENDANT MR. MASSIE: Right.

THE COURT: Secondly, you should understand, and I think it is important that you understand, that this county was the sole county -- maybe there was one other county -- in the State of California that did not vote for Proposition 7, the new death penalty legislation that went into effect November of 1978.

Are you aware of that, sir?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: You understand that the jurors would be taken from the population of voters that voted that way?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: And that we have available to us at this time 89 or 87 of such voters available to pick a jury at this moment, sitting in the courtroom?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Now, the Court cannot accept a waiver over the objection of your counsel. That is, if the attorneys, Mr. Berman and Mr. Gaines, do not concur in the waiver of the jury trial, I cannot accept that waiver so long as they are your counsel.

And do you understand that?

THE DEFENDANT MR. MASSIE: I've dismissed them.

THE COURT: Are you telling the Court that you at this time wish to give up your right to have the advice of counsel for the penalty phase of the trial?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you wish to act as your own attorney?

THE DEFENDANT MR. MASSIE: Yes. May I ask a question before you go further?

THE COURT: Yes, sir.

THE DEFENDANT MR. MASSIE: Insofar as it concerns this confession that was placed on tape and made a transcript of, can this be made sealed by the Court?

THE COURT: No, sir, because it's going to be an issue on appeal.

MR. GAINES: Your Honor, can I ask about on behalf of Mr.

Massie --

THE DEFENDANT MR. MASSIE: Go ahead.

MR. GAINES: I don't think he's taken your waiver of counsel yet. Still as counsel of Mr. Massie, your Honor, there is certain matters in the confession which causes my client great concern for his safety in the future.

And what we're asking is that in open court that the Court realize in the penalty phase, the People will be allowed to prove their case. They have not had an opportunity to do so thus far to the trier of fact.

That the Court recognize that it has considered the transcript and that the tape not be played in open court, and that my client is willing to enter into a stipulation as -- since it has been admitted by this Court -- that the Court has read and considered that piece of evidence and that the tape need not be played again.

The Court has already heard the tape in a closed proceeding. I think that that would be appropriate.

I don't think, as long as there is a proper waiver of any rules of evidence, that I can see, by Mr. Massie, I don't believe that the thrust of the People's case will be diminished. I think their rights are protected.

One more thing. Secondly, your Honor, as to -- for the record on appeal, is it not possible that if a transcription is entered into evidence by the Court that that may be a sealed part of the record that the Court of Appeal may consider and not be made part of the public record?

This is really all that Mr. Massie is asking about this

trial.

THE DEFENDANT MR. MASSIE: The reason for that, your Honor, is that it not only endangers me, but it endangers -- it endangers the lives of personnel. It endangers the lives of police guards and anyone who may have supervision over me.

We have such a thing as kamikazes in various places who will do anything to carry out contracts that have been put on people.

THE COURT: Just a minute, Mr. Massie. Mr. Lassart, do you have anything?

MR. LASSART: Well, your Honor, first of all, tendering back to Court Exhibit 3 and 4, and it's People's position on the penalty phase of the case that if we so wished to place the statement as evidence in the penalty phase, we'll enter into a stipulation with the defense that the Court has already heard it and may consider what it's heard.

THE COURT: All right. Fine.

THE DEFENDANT MR. MASSIE: I'd also like my statement just then, as being recorded right here, entered into that sealed part of that document.

THE COURT: All right. That would become only part of the record on the appeal and would only be seen by the appellate courts. So you don't have to worry about that. We can cross that bridge.

But at this time, then, there would be no playing of the tape in open court.

MR. GAINES: Thank you very much.

THE DEFENDANT MR. MASSIE: Thank you, your Honor.

THE COURT: And any transcript relating to that could be sealed in the court file.

THE DEFENDANT MR. MASSIE: Thank you.

THE COURT: That will be the order. And, Betty, you'll note that Court's Exhibit 4 would be ordered sealed in the future when tendered back to the Court to be submitted to the Court of Appeal in a sealed fashion.

All right. Now, Mr. Massie, I forgot. I was interrupted here. You have the right to have an attorney throughout all stages of this hearing, as you know.

And it's my understanding that you wish to give up that right at this time because of your preference on the procedure to be used in the penalty phase; is that correct?

THE DEFENDANT MR. MASSIE: That's correct.

THE COURT: Have you ever represented yourself in court before, sir?

THE DEFENDANT MR. MASSIE: In open court, no. On appeal, yes.

THE COURT: And you represented yourself in pro per in the case of People versus Massie, 6 Cal. 2d; is that correct?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: The Court is aware of that, having read the case. However, do you feel that you would be able to handle the rules of evidence and so on that would --

THE DEFENDANT MR. MASSIE: If you appoint counsel to -- in an advisory capacity, I'm sure there would be no problems.

THE COURT: I will appoint standby counsel, which means at such time I determine that you are not able to proceed as your

own counsel, they would be re-appointed. You have the right to represent yourself.

THE DEFENDANT MR. MASSIE: I realize that.

THE COURT: And you have a right to have throughout all stages, to have your own attorney. But as standby counsel is not the same thing.

You either have counsel or you don't have counsel, and you have standby counsel who will be available as and when you cannot proceed as your own counsel. And that matter is rather clear.

So with that understanding, you should understand that that would be the position of the Court.

THE DEFENDANT MR. MASSIE: Okay.

THE COURT: And I'm sorry, I was looking for something, and I just --

MR. LASSART: Your Honor, perhaps the Court could ask Mr. Massie if his employment just prior to these times of these incidents, he has some experience working for attorneys in research. He has some background in the law.

THE COURT: Just a minute. I have a form that I had authored in this state-wide book, but I can't find my own. Here we go. Okay.

All right. Now, first of all, you should understand that the Court will and may terminate self-representation if you deliberately engage in any serious or obstreperous misconduct before the Court in any of the proceedings. Do you understand that?

THE DEFENDANT MR. MASSIE: Of course.

THE COURT: And that I have considered it and I consider it detrimental for you not to accept the appointment of counsel to represent you. Do you understand that?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: And do you understand that if you are allowed to represent yourself, you must follow all the rules applicable to the trial of any criminal case?

THE DEFENDANT MR. MASSIE: Fine.

THE COURT: And that there are numerous dangers and disadvantages to representation.

First of all, your vocabulary or the Court's vocabulary may impede clear communication with the Court and opposing counsel.

And that the Court will not act on your behalf in asserting objections and making appropriate motions where ordinarily, it would be the duty of counsel to call such matters to the Court's attention.

You understand that?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: All right. Also, the District Attorney will not assist you in the defense of your case.

THE DEFENDANT MR. MASSIE: I don't expect him to.

THE COURT: You understand that there are rules of law that are technical and cannot be set aside even in view of the status that you are in pro per?

THE DEFENDANT MR. MASSIE: That's right.

THE COURT: And also that you may unwittingly and unknowingly waive constitutional statutory and common law rights

during the proceedings?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: All right. And you understand that since you are in custody, it may be difficult to locate witnesses, interview them and prepare other items that you may want to present to the Court?

THE DEFENDANT MR. MASSIE: Well, it's not my intention to call any witnesses. If you appoint counsel to co-reside beside me, if he decides to call some people in that he knows, that's fine. If not, that's fine, too.

My intent is to get this proceeding over with.

THE COURT: I understand that witnesses are available to testify in your behalf, and I would so make the resources of the Public Defender's Office available to you to serve those subpoenas and bring those witnesses into court.

MR. BERMAN: Your Honor, I can see a slight problem here. We should get it cleared up.

Mr. Massie -- if the Court grants him that position, be acting as his own attorney, if as standby counsel we wish to present witnesses and Mr. Massie is not going to call them, we have no way of presenting them. And Mr. Massie should understand that.

THE COURT: In other words, that under the auspices of your office, you would make them available.

MR. BERMAN: They're available, but Mr. Massie must understand that we cannot force him to call those witnesses even though we advise him to.

THE COURT: The resource of your office is available, and

the witnesses have already been subpoenaed.

And if Mr. Massie is acting as his own counsel, he may call them or may not if he chose to do so.

But any resources of that office will be fully available to you to bring those witnesses -- to bring them into the court, and you may put them on the stand at this time.

MR. LASSART: May I indicate to the Court Mr. Massie's position. Mr. Massie is in a position, your Honor, as being as his own counsel --

THE COURT: I haven't taken that.

MR. LASSART: If he acts as his own counsel, that no evidence can be presented unless he puts it on. That's a simple statement.

THE COURT: I'm going to do that. But you understand that that's --

THE DEFENDANT MR. MASSIE: I understand what you are saying, your Honor. If I decided to forego the witnesses, could we have the penalty trial today and a possible sentencing within a few days?

THE COURT: It probably will take a couple of days, I'll be very honest with you.

I think the People have witnesses that they are trying to obtain. We may get some evidence in today, and I would want to give you the opportunity to have these resources available to you and put these witnesses on. Whatever evidence they may have to offer on the issue.

It's only right that you have a full and fair hearing on the issue before the Court.

THE DEFENDANT MR. MASSIE: Okay. Well, it would probably be better then if counsel represented me insofar as it concerns witnesses. That is, providing the District Attorney has no objection because I'm waiving a jury against the advice of counsel. And that waiver stands.

I will not accept a jury. However, I'll take representation of counsel insofar as it concerns whatever witnesses he wants to bring into court.

MR. BERMAN: Your Honor, as I understand it, we can make them available. We cannot be questioning them because then we are back to the beginning.

THE COURT: If I relieve counsel from representation, they are relieved. However, they are standing by, and they will have, and I'm ordering them to make available the resources that they have used to prepare this case for trial, namely their investigators and subpoenas that have been issued and so on so that you don't lose the momentum of those assets.

But if I relieve them as counsel, they are relieved as counsel period.

THE DEFENDANT MR. MASSIE: They will not be permitted to --

THE COURT: Not until I deem that you no longer can operate as your own counsel.

THE DEFENDANT MR. MASSIE: Well, let me see if I have this straight. The District Attorney had no objections to my waiving a jury trial. And that was his only objection at the time insofar as it concerned this whole ball of wax.

You don't have any objections to these guys acting as my attorneys insofar as it concerns witnesses at a penalty trial?

MR. BERMAN: Robert --

THE COURT: It's not his objection. It's not his objection. The law clearly states that either you are acting as your own attorney or you have counsel acting for you. There's not a gray area.

THE DEFENDANT MR. MASSIE: If counsel so desires, then let counsel continue acting for me in my behalf and --

THE COURT: You see, they refuse to do so unless they have a jury trial.

MR. BERMAN: We refuse to waive a jury.

THE COURT: You refuse to waive a jury.

THE DEFENDANT MR. MASSIE: I see.

THE COURT: If they are going to represent you, they want a jury for the penalty phase.

THE DEFENDNAT MR. MASSIE: That's unacceptable.

MR. GAINES: Judge, can I make a statement? I think we'll clear this up. I think it's a proper statement for the record.

What we'd like to do, as standby counsel having represented Bob during this entire period -- we have now been dismissed as his counsel --

THE COURT: I haven't accepted that yet.

MR. GAINES: All right. That has not been accepted yet. However, in view of the defendant's statement, in view of the fact that the Court may well accept it, could -- I don't see any problem with the ground rules on the part of making our offices available. For the momentum of preparation of this case and the momentum of preparation of this case for a penalty phase also, that we merely conduct consultation with the

defendant as to who the witnesses are and what their testimony would be.

And that he can make a decision as to whether he feels that they would be helpful in his case.

THE COURT: If he wants to consult with you at any time, you have the right to consult with him. But you are not acting in the courtroom as counsel.

MR. GAINES: I understand that, your Honor.

THE COURT: Or during the trial. In other words, if he wants your consultation, because he has the use of your office and your investigators, and so on, I'm not going to prohibit that.

But when I relieve you of counsel, I'm ordering your office to provide him and assist him in his defense of this issue.

MR. GAINES: That's all I'm saying, your Honor.

THE COURT: But you are standby counsel, and if he calls them, they are his witnesses.

MR. GAINES: I appreciate that.

THE COURT: Now, you understand that -- Mr. Massie, do you understand what I've been discussing?

THE DEFENDANT MR. MASSIE: Yes, I do, your Honor.

THE COURT: Do you understand if you act as counsel, you acting as your own counsel. You may at other times use the resources of the Public Defender's Office as a resource to assist you.

THE DEFENDANT MR. MASSIE: I propose --

THE COURT: They are not the attorneys of record.

THE DEFENDANT MR. MASSIE: I propose to let prosecution

put on -- put on his witnesses and I'll just rest the case.

THE COURT: I don't want you to do that without using and seeing if you have -- you may wish to present evidence.

THE DEFENDANT MR. MASSIE: Counsel has already told me that he would not represent me unless I would not waive a jury.

THE COURT: That's right.

THE DEFENDANT MR. MASSIE: That being the way it is, then I have elected then to let the prosecutor put on witnesses, and I'll just simply rest the case.

THE COURT: I won't accept that at this time without your giving it full consideration.

THE DEFENDANT MR. MASSIE: Okay. Fine.

MR. GAINES: Thank you, your Honor. What I've explained is that we do not have to discuss on the record trial tactics at this time, and that as part of the using the offices of the Public Defender's Office, we, since the defendant is in custody, will make these witnesses available.

We will discuss with him out of court, obviously private consultation, what their testimony is germane to, and he can decide whether he wishes them to be present. We will be sure that they are if he so wishes.

THE COURT: I'll also make available to you the legal resources of the Public Defender's Office if you need them, Mr. Massie.

MR. LASSART: Yes, your Honor. I'm sure Mr. Gaines' knowing and Mr. Berman's aptitude, they're going to be giving him, if Mr. Massie needs assistance, the questions to ask in presenting these witnesses if he so wishes to present questions.

THE COURT: Whatever the resources are, they are available to him.

THE DEFENDANT MR. MASSIE: Your Honor, the only other request I'd make is to be allowed to use the telephone upstairs.

THE COURT: Yes. Let me finish this waiver before I get to those type details.

Do you now, understanding all these consequences that I've discussed with you and understanding that you would be acting as your own counsel and that you have the resources of the Public Defender's Office available to you, I ask you at this time: Do you give up the right to a jury trial in the issue of the penalty phase of this case?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you do that freely and voluntarily?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Has anyone coerced you to do that?

THE DEFENDANT MR. MASSIE: No.

THE COURT: First of all, do you give up your right to have an attorney represent you on these proceedings?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: You wish to act as your own counsel?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: Do you do this freely and voluntarily?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: And no one has coerced you to do this?

THE DEFENDANT MR. MASSIE: No.

THE COURT: You don't feel you've been threatened or intimidated in any way to do that?

THE DEFENDANT MR. MASSIE: No.

THE COURT: Therefore, acting as your own counsel, the Court finding that the defendant has made a knowing and intelligent waiver of counsel, that he, knowing the consequences of such a waiver, he has moved the Court to act as his own counsel.

The Court finding such a waiver to be free and voluntary now relieves Mr. Michael Gaines and Robert Berman as attorneys for the defendant, Robert Lee Massie and has substituted Robert Lee Massie in propria persona in the case.

Now, Mr. Massie, as acting in propria persona, I ask you: Do you give up your right to have a jury trial on the issue of the penalty phase of this case?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: You understand that you are giving that up having admitted and pled guilty to a charge or murder in the first degree with special circumstances?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: The Court finds that the defendant has made a knowing and intelligent waiver of his right to a jury on the issue of the penalty phase and will accept and enter that waiver in the minutes.

Counsel have anything else before --

MR. LASSART: Your Honor, just to -- for the record on that waiver, it's People's understanding not only does Mr. Massie want to waive it, but it's really based on an inherent conflict, a tactical situation, the conflict which comes within the parameter of People versus Marson which is that the defense attorneys do not wish to waive the jury, and the defendant

clearly does. That's the kind of conflict in which the defendant then has the election to represent himself.

THE COURT: I think the record is clear on that. Thank you very much. I think it clear. I think we should go out -- we have had the jury sitting there almost two hours -- to dismiss the jury.

THE DEFENDANT MR. MASSIE: Would you make some type of order which would enable me to use the telephone upstairs at least once or twice a day if I have to call to call these guys?

THE COURT: I'll give you about six phone calls.

THE DEFENDANT MR. MASSIE: Per day?

THE COURT: Yes.

THE DEFENDANT MR. MASSIE: Okay. Fine.

THE COURT: All right. I'll be back on the record in a minute. I think at this time it's appropriate I go out and inform the jury what has occurred.

They are going to read it. So they may as well know because they've been sitting here a long time.

I'm not going to give them all the information. I'm just going to say what principally occurred so there's no guessing.

MR. LASSART: Fine, your Honor. Basically, is it the Court's intention to put this matter over until 9:30 tomorrow morning?

THE COURT: Let's take a few minutes and see how your availability of witnesses is and I understood Mr. Massie, if it was available, wanted to proceed this afternoon.

I have no objection to starting at 9:30 tomorrow morning so you can get whatever things you need together, Mr. Massie.

Why don't you think about it a few minutes and I'll be back on the record with you.

THE DEFENDANT MR. MASSIE: I'm willing to start this afternoon.

THE COURT: We'll see where we are, and I'll see how the People's witnesses -- understanding that this is a little bit out of order. I understand that that's your desire.

THE DEFENDANT MR. MASSIE: Fine.

(The following proceedings were had in open court in the presence of the panel of prospective jurors:)

THE COURT: Ladies and gentlemen, I first of all want to thank you for being here timely this morning and being present for the last almost two hours.

It is my custom and practice ordinarily -- and I notice some of you, I recognize some of you having been here before -- to start timely and not to delay the jury service of jurors.

As we started to come out this morning at 9:30, the defense counsel brought something to my attention. I had to go on the record about that. And I have been continuously either on the record or allowing consultation between counsel, and the case that had been sent to me yesterday concerning this case.

I don't like to keep you in the dark, and I'll tell you exactly what has happened this morning. Yesterday morning, this Court was assigned the case of Robert L. Massie. It is a murder case, charging murder in the first degree and charging certain special circumstances which, if true, would put into question whether or not the death penalty should be imposed.

This morning, as we came out to pick a jury to try this

case, the defendant indicated to the Court and to his counsel that he wished to plead guilty to each and every charge that was put before the Court which are some nine counts, including two robbery and use of a firearm allegation.

I was taken aback. It took me, as you can see, this amount of time to determine whether this was a free and voluntary plea of guilty to make sure that a defendant with such a liability was pleading guilty to a charge freely and voluntarily.

I must do this under the law. I have accepted those pleas, and I have accepted the admission of the special circumstances. The defendant now has waived a jury on the issue of the penalty. A matter that now I will have to determine.

And while it certainly is more comforting to the Court to have twelve citizens of the community and their consciences arrive at this stage, the defendant and the District Attorney have waived a jury in this case and have asked that I make that determination for whatever it is.

I'm telling you this because you are going to read it in the paper. This case is rather notorious. It was the case of the shotting of the gentleman at the Miraloma Liquor Store some months ago. So that's where we are.

So I just want to thank you. I had no idea that such circumstances would occur, and all I can say is thank you for your service here. You are going to be excused now because the ball is in my court, as they say.

I've a lot of work to do. So I do want to thank you, and I've explained this to you because you may wonder why you've been sitting here for almost two hours. It's not an easy

decision to accept those waivers.

So if you need your slip for work, please see Miss Parker. You do get credit for today and yesterday. And thank you very much.

(The following proceedings were had in chambers:)

THE COURT: Let the record reflect that we are in chambers. Mr. Massie, in pro per, the District Attorney. In the back of the chambers are Mr. Gaines and Mr. Berman who are available to provide resources to the defendant.

Mr. Massie, now on the scheduling of the hearing, first of all, I'm going to order the Public Defender to turn over the information they have to you so that you can review that.

The District Attorney, you have evidence to put in and you are going to ask for certain stipulations with Mr. Massie?

MR. LASSART: Yes, I am. Mr. Massie --

THE COURT: Well, why don't we do it through the Court.

MR. LASSART: Okay. All right. The People will ask Mr. Massie if he will stipulate to testimony of the witnesses at the preliminary hearing, that their testimony totally, direct examination and cross-examination, can be considered as evidence in the penalty phase.

And the witnesses, I would designate the particular witnesses -- it would be all the witnesses except Inspector Clark who took the statement. And that's the stipulation.

THE DEFENDANT MR. MASSIE: So stipulated.

THE COURT: You understand that by stipulating to that, you would admit that the questions were asked by the attorneys as set forth --

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: And that the answers were given as set forth, and that each witness was sworn?

THE DEFENDANT MR. MASSIE: Yes.

THE COURT: All right.

MR. LASSART: And may I ask just so this is a further explanation: Some of those witnesses had evidentiary items introduced through them, and those would also be evidence.

For instance, there was a line-up photograph in one or weapons were introduced through them.

THE COURT: I would like you to produce those at the hearing.

MR. LASSART: I will. Fine.

THE COURT: Now, if there is any objection to any portion of those, Mr. Massie, I'll allow you to make those during an in court hearing.

My suggestion is, and I think it would be in the best interest so that any witnesses that you may want to call, at least so that you may have the option of considering whether or not you wish to call them, might intend at this time, and to facilitate the hearing so that it can be -- you wish to have it in one day, and I can understand your concern -- that we start at 9:30 tomorrow and dedicate tomorrow to the hearing on this phase.

And by then, we should have, if not a decision tomorrow, within the end of the week.

THE DEFENDANT MR. MASSIE: As far as witnesses go, I don't know any at present. Perhaps Michael Gaines might know. I may

call him as a witness to say anything he feels he'd like to say about me.

I think he intended to call Mr. Paul Comiskey into the proceedings. Whoever else, I don't know.

THE COURT: All right. That's why I would like this file turned over to you. They would be able to discuss what they have done for you and the subpoenas that they have served during this afternoon.

And that you take this afternoon to review your case that you have the full opportunity tomorrow to be fully informed.

THE DEFENDANT MR. MASSIE: Fine.

THE COURT: Is that fair enough?

THE DEFENDANT MR. MASSIE: Sure.

THE COURT: All right. Then the hearing on the penalty phase will hereby be set and ordered at 9:30 tomorrow morning, Department 23. He has six phone calls coming.

THE DEFENDANT MR. MASSIE: Fine.

THE COURT: Mr. Gaines and Mr. Berman, if you wish to make an appointment, just tell Mr. Massie when you are going to be up and then Deputy Yazzolino can make sure that a conference is available.

MR. BERMAN: We'll be up at two o'clock with the entire files and turn everything in our file over to Robert Massie.

MR. GAINES: We have to put everything all together, your Honor.

THE COURT: All right. Fine. Thank you. We'll see you tomorrow morning.

THE DEFENDANT MR. MASSIE: Okay, your Honor.

(Whereupon the proceedings were adjourned until Wednesday, May 9, 1979, at 9:30 a.m.)

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CERTIFICATE OF SERVICE BY MAIL

I, Randall C. Brummitt, certify that I am the attorney for petitioner in this action, and that I served a true copy of the attached PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on respondent, by placing the same in an envelope (or envelopes) addressed as follows:

George Deukmejian, Attorney General
Robert H. Philibosian
Edward P. O'Brien
William D. Stein
6000 State Building
San Francisco, CA 94102

Each said envelope was then sealed and deposited in the United States mail on October 3, 1980, in Oakland, California, with the postage thereon fully prepaid.

Executed on October 3, 1980, at Oakland, California.

Randall C. Brummitt